

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TAMARA WENDLING,	)	
	)	No. CV-09-3090-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR ADDITIONAL
MICHAEL J. ASTRUE, Commissioner	)	PROCEEDINGS PURSUANT TO 42
of Social Security,	)	U.S.C. § 405(g)
	)	
Defendant.	)	
	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 17, 22.) Attorney D. James Tree represents Tamara Wendling (Plaintiff); Special Assistant United States Attorney Willy M. Le represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on January 17, 2006. (Tr. 8, 93.) In her initial application, Plaintiff alleged disability due to major depressive disorder, back pain and anxiety,

1 with an onset date of September 18, 2003. (Tr. 93, 109.) Benefits  
2 were denied initially and on reconsideration. Plaintiff timely  
3 requested a hearing before an administrative law judge (ALJ), which  
4 was held before ALJ Richard Say on October July 15, 2008. (Tr. 8,  
5 20-42.) Plaintiff, who was represented by counsel, and vocational  
6 expert Gary R. Jesky (VE) testified. (*Id.*) At the July 2008  
7 hearing, the ALJ indicated a psychological evaluation was needed to  
8 further develop the record. (Tr. 41.) The additional evidence was  
9 entered into the record on or about January 26, 2009, without  
10 further proceedings. (Tr. 18-19.) The ALJ denied benefits on March  
11 24, 2009, and the Appeals Council denied review. (Tr. 8-17, 1-4.)  
12 The instant matter is before this court pursuant to 42 U.S.C. §  
13 405(g).

#### 14 STANDARD OF REVIEW

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
16 court set out the standard of review:

17 A district court's order upholding the Commissioner's  
18 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
19 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
20 Commissioner may be reversed only if it is not supported  
21 by substantial evidence or if it is based on legal error.  
22 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
23 Substantial evidence is defined as being more than a mere  
24 scintilla, but less than a preponderance. *Id.* at 1098.  
25 Put another way, substantial evidence is such relevant  
26 evidence as a reasonable mind might accept as adequate to  
27 support a conclusion. *Richardson v. Perales*, 402 U.S.  
28 389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed



1 age, education and work experience, engage in any other  
2 kind of substantial gainful work which exists in the  
3 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

4 In evaluating whether a claimant suffers from a  
5 disability, an ALJ must apply a five-step sequential  
6 inquiry addressing both components of the definition,  
7 until a question is answered affirmatively or negatively  
8 in such a way that an ultimate determination can be made.  
9 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
10 claimant bears the burden of proving that [s]he is  
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
1999). This requires the presentation of "complete and  
detailed objective medical reports of h[is] condition from  
licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
404.1512(a)-(b), 404.1513(d)).

11 The Commissioner has established a five-step sequential  
12 evaluation process for determining whether a person is disabled. 20  
13 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
14 137, 140-42 (1987). In steps one through four, the burden of proof  
15 rests upon the claimant to establish a prima facie case of  
16 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
17 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
18 establishes that a physical or mental impairment prevents him from  
19 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),  
20 416.920(a). At step five, the burden shifts to the Commissioner to  
21 show that (1) the claimant can perform other substantial gainful  
22 activity; and (2) a "significant number of jobs exist in the  
23 national economy" which claimant can perform. 20 C.F.R. §§  
24 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
25 1498 (9<sup>th</sup> Cir. 1984).

#### 26 STATEMENT OF THE CASE

27 The facts of the case are set forth in detail in the transcript

1 of proceedings and are briefly summarized here. At the time of the  
2 hearing, Plaintiff was 40 years old with an eighth or tenth grade  
3 education and no high-school equivalency degree. (Tr. 25, 327.)  
4 She testified she was in regular classes in the resource center  
5 during high school, where she received one-on-one instruction.  
6 (*Id.*) However, elsewhere in the record she reported she was in  
7 special education classes. (Tr. 346.) Although Plaintiff testified  
8 she was unmarried and lived alone in an apartment at the time of the  
9 hearing (Tr. 25-26), her marital status is unclear. In March 2006,  
10 Plaintiff told her treating psychiatrist she was still married to a  
11 man she married in 1991, but had not seen since 1993. She stated  
12 he married her to obtain his green card, and she was "hoping to  
13 divorce him." (Tr. 213.) In January 2009, she reported to an  
14 examining psychologist that she had never been married. (Tr. 327.)  
15 Plaintiff has past work experience as an assembly worker (toys), a  
16 camp host, a dishwasher, housekeeper, and prep cook/cashier. (Tr.  
17 96.) She testified she became unable to work after a 2003 car  
18 accident in which her back and shoulders were injured. (Tr. 26.)  
19 She also stated depression and anxiety prevented her from working at  
20 the present. (Tr. 27.) She reported she was able to attend to  
21 personal needs and do some household chores such as cooking, dishes  
22 and laundry. (*Id.*) However, she stated she socialized very little.  
23 (Tr. 30, 32-33.) She reported she could sit or stand for about ten  
24 minutes before she started hurting, and she needed to take naps two  
25 times a day for a couple of hours due to pain and depression. (Tr.  
26 31.) She stated she was seeing a mental health professional two  
27 times a month for counseling and a psychiatrist every three months.

1 (Tr. 32.)

2 **ADMINISTRATIVE DECISION**

3 ALJ Say found Plaintiff met the insured status requirements  
4 through September 30, 2006. (Tr. 10.) At step one, he found  
5 Plaintiff had not engaged in substantial gainful activity since  
6 September 18, 2003. (*Id.*) At step two, he found Plaintiff had  
7 severe impairments of borderline intellectual functioning; obesity;  
8 depression; anxiety; and back pain. (*Id.*) At step three, he found  
9 Plaintiff's impairments, alone and in combination, did not meet or  
10 medically equal one of the listed impairments in 20 C.F.R., Appendix  
11 1, Subpart P, Regulations No. 4 (Listings). (*Id.*) At step four,  
12 ALJ Say determined Plaintiff had the residual functional capacity  
13 (RFC) to perform light work as defined by the Social Security  
14 regulations (Regulations) with the following restrictions: she is  
15 precluded from climbing ladders, ropes and scaffolds; she is limited  
16 to occasional climbing of ramps and stairs, stooping, crouching,  
17 crawling and kneeling; and she is limited to frequent balancing and  
18 should avoid hazards and vibrations. (Tr. 12.) He also determined  
19 Plaintiff was "limited to spoken simple instructions; no interaction  
20 with the general public; and limited to superficial interaction with  
21 co-workers." (*Id.*) Based on this RFC and VE testimony, the ALJ  
22 determined Plaintiff could perform her past relevant work as an  
23 assembler and a motel housekeeper. (Tr. 17.) He concluded  
24 Plaintiff was not disabled from the alleged onset date through the  
25 date of his decision. (*Id.*)

## ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when he: (1) found Plaintiff's impairments did not meet or equal a Listing; (2) rejected the opinions of her treating and examining doctors; (3) improperly rejected her testimony and the testimony of her friend; and (4) failed to conduct a proper step four analysis. (Ct. Rec. 18 at 7.)

## DISCUSSION

### A. Credibility

In his policy ruling, the Commissioner directs that:

When the existence of a medically determinable physical or mental impairment(s) that could reasonably be expected to produce [alleged] symptoms has been established, the intensity, persistence, and functionally limiting effects of the symptoms must be evaluated to determine the extent to which the symptoms affect the individual's ability to do basic work activities. This requires the adjudicator to make a finding about the credibility of the individual's statements about the symptom(s) and its functional effects.

SSR 96-7p.<sup>1</sup>

In his evaluation of a claimant's statements as to the severity of impairments, pain, and functional limitations, the ALJ must make a credibility determination with findings sufficiently specific to

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<sup>1</sup> Social Security Rulings are issued to clarify the Regulations and policy. They are not published in the federal register and do not have the force of law. However, under the case law, deference is to be given to the Commissioner's interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9<sup>th</sup> Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3(9<sup>th</sup> Cir. 1991) (*en banc*).

1 permit the court to conclude the ALJ did not arbitrarily discredit  
2 claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959  
3 (9<sup>th</sup> Cir. 2002); *Bunnell*, 947 F.2d at 345-46. It is well-settled,  
4 however, that an ALJ cannot be required to believe every allegation  
5 of disabling pain, even when medical evidence exists that a  
6 claimant's condition may produce pain. "Many medical conditions  
7 produce pain not severe enough to preclude gainful employment."  
8 *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). Although an  
9 adjudicator may not reject a claimant's extreme symptom complaints  
10 solely on a lack of objective medical evidence, medical evidence is  
11 a relevant factor to consider. *SSR 96-7p*.

12 If there is no affirmative evidence that the claimant is  
13 malingering, the ALJ must provide "clear and convincing" reasons for  
14 rejecting the claimant's symptom testimony. *Reddick v. Chater*, 157  
15 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). The ALJ engages in a two-step  
16 analysis in deciding whether to admit a claimant's subjective  
17 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36  
18 (9<sup>th</sup> Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996).  
19 Under the first step, the ALJ must find the claimant has produced  
20 objective medical evidence of an underlying "impairment," and that  
21 the impairment, or combination of impairments, could reasonably be  
22 expected to cause "some degree of the symptom." *Lingenfelter*, 504  
23 F.3d at 1036. Once the first test is met, the ALJ must evaluate the  
24 credibility of the claimant and make specific findings supported by  
25 "clear and convincing" reasons. *Id.*

26 In addition to ordinary techniques of credibility evaluation,  
27 the ALJ may consider the following factors when weighing the  
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1 claimant's credibility: the claimant's reputation for truthfulness;  
2 inconsistencies either in his allegations of limitations or between  
3 his statements and conduct; daily activities and work record; and  
4 testimony from physicians and third parties concerning the nature,  
5 severity, and effect of the alleged symptoms. *Light v. Social Sec.*  
6 *Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997); *Fair*, 885 F.2d at 597 n.5.  
7 As explained by the Commissioner in his policy ruling, the ALJ need  
8 not totally reject a claimant's statements; he or she may find the  
9 claimant's statements about pain to be credible to a certain degree,  
10 but discount statements based on his interpretation of evidence in  
11 the record as a whole. *SSR 96-7p*. The ALJ may find a claimant's  
12 abilities are affected by the symptoms alleged, but "find only  
13 partially credible the individual's statements as to the extent of  
14 the functional limitations." *Id.*

15 Although credibility determinations are the province of the  
16 ALJ, and "the court may not engage in second-guessing," *Thomas*, 278  
17 F.3d at 959, the court has imposed on the Commissioner a requirement  
18 of specificity. *Connett v. Barnhart*, 340 F.3d 871, 873 (9<sup>th</sup> Cir.  
19 2003); *Dodrill v. Shalala*, 12 F.3d 915, 917 (9<sup>th</sup> Cir. 1993). Even  
20 if the record includes evidence to support a credibility  
21 determination, the reasons must be articulated with specificity by  
22 the ALJ in his decision. The court cannot infer lack of credibility  
23 or affirm credibility findings "based on evidence the ALJ did not  
24 discuss." *Connett*, 340 F.3d at 874. Further, the reviewing court  
25 cannot make independent findings to support the ALJ's decision. *Id.*

26 Here, there is no finding of malingering. Although the ALJ  
27 summarized the medical evidence, and referenced Plaintiff's reports  
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1 to medical providers as well as medical provider observations and  
2 opinions that could reasonably impugn Plaintiff's credibility, the  
3 ALJ did not articulate any credibility findings. For example, at  
4 the hearing, Plaintiff testified she could sit and stand for only  
5 ten minutes and needed to lie down two times a day for an hour each  
6 time due to depression. (Tr. 31.) However, as noted by the ALJ in  
7 his discussion of the medical evidence, medical providers found she  
8 could perform light work, and her mental health therapist reported  
9 she was doing very well on anti-depressants and reported she was  
10 active and not feeling depressed. (Tr. 13, 14.)

11 Independent review also indicates Plaintiff's testimony was  
12 inconsistent with reports to providers regarding her education and  
13 marital status. (Tr. 25, 213, 327, 346.) She also exhibited a lack  
14 of candor about past and present drug use. Records show in December  
15 2008, Plaintiff denied a history of drug use during an examination  
16 with Dr. Toews. However, in January 2009, Plaintiff reported to Dr.  
17 Bates-Smith that she was using marijuana daily and had used  
18 methamphetamine two years prior. (Tr. 212, 326-27, 347.)

19 Although the ALJ discussed evidence that might be a basis for  
20 a rejection of Plaintiff's pain and symptom allegations, the court  
21 cannot infer credibility. Where evidence exists in the record that  
22 may be a basis for a credibility finding, but specific "clear and  
23 convincing" reasons for rejecting or discounting a claimant's  
24 allegations are not articulated by the ALJ, remand for additional  
25 proceedings is the proper disposition. *Connett*, 340 F.3d at 876;  
26 *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1990); *Bunnell*,  
27 947 F.2d at 348.

1 **B. Step Four Findings**

2 At step four, the ALJ found Plaintiff could perform two of her  
3 past jobs. Plaintiff asserts the step four findings are deficient  
4 for several reasons: the ALJ did not make the requisite findings  
5 regarding her ability to perform work tasks, he did not make  
6 sufficient findings regarding the demands of her past work, and he  
7 relied on VE testimony that did not include all limitations  
8 supported by the record and Plaintiff's unrejected testimony. (Ct.  
9 Rec. 18 at 15-19.)

10 Although the burden of proof lies with the claimant at step  
11 four, the ALJ still has a duty to make the requisite factual  
12 findings to support his conclusion. SSR 82-62. This is done by  
13 looking at the "residual functional capacity and the physical and  
14 mental demands" of the claimant's past relevant work. 20 C.F.R. §§  
15 404.1520(a)(4)(iv); 416.920(a)(4)(iv). Past relevant work is work  
16 performed in the last 15 years, lasted long enough to learn it and  
17 was substantial gainful employment. SSR 82-61. In finding that an  
18 individual has the capacity to perform a past relevant job, the  
19 decision must contain the following specific findings of fact:

20 1. A finding of fact as to the individual's residual  
21 functional capacity;

22 2. A finding of fact as to the physical and mental demands of  
23 the past job/occupation; and

24 3. A finding of fact that the individual's residual  
25 functional capacity would permit a return to his or her past job or  
26 occupation. SSR 82-62.

27 These findings must be based on the evidence in the record and  
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1 must be developed and fully explained in the disability decision.  
2 Evidence of the physical and mental demands of a particular job is  
3 found primarily in statements and vocational documentation by the  
4 claimant and the medical evidence; supplementary information may be  
5 found in the DICTIONARY OF OCCUPATIONAL TITLES (DICOT), other  
6 administratively recognized publications, or vocational expert  
7 testimony. SSR 82-61, 82-62. Vocational experts are used most  
8 often at an ALJ hearing. SSR 00-4p. Step four requires specific  
9 findings on all three points sufficient "to insure that the claimant  
10 really can perform his past relevant work." *Pinto v. Massanari*, 249  
11 F.3d 840, 845 (9<sup>th</sup> Cir. 2001); see also SSR 00-4p (vocational experts  
12 relied upon to provide more specific information about jobs than  
13 DICOT). Further, the final RFC must take into consideration the  
14 effects of severe and non-severe impairments, alone and in  
15 combination. 20 C.F.R. §§ 404.1545(a)(2); 416.945(a)(2).

16 Here at step four, the ALJ failed to make specific findings as  
17 to the demands of Plaintiff's past work as an assembler and motel  
18 clerk, taking into consideration Plaintiff's unrejected testimony  
19 regarding her exertional limitations, need to lie down twice a day,  
20 and back pain. (Tr. 17.) On remand, the ALJ will make new step  
21 four findings, including a new RFC assessment considering new,  
22 specific credibility findings, and explaining with specificity the  
23 weight given to unrejected physical and mental limitations assessed  
24 by the medical sources. Regarding examining psychologists Karen  
25 Bates-Smith, Ph.D., and Jay Toews, Ed.D., the ALJ will discuss  
26 thoroughly the evidence submitted by these acceptable medical  
27 sources and explain the weight given their objective test results,

1 their diagnoses of borderline intellectual functioning, and moderate  
2 and marked limitations assessed in their medical source statements.  
3 SSR 96-5p, 96-2p; (see, e.g., Tr. 281-304, 383-405.) As discussed  
4 below, medical expert testimony may be required to explain medical  
5 evidence and assist the ALJ in resolving ambiguities and/or  
6 conflicts. Additional VE testimony will be taken to consider a  
7 hypothetical which includes all unrejected limitations assessed by  
8 medical providers (including those in the post-hearing evidence) and  
9 alleged by Plaintiff.

### 10 **C. Step Three: The Listings**

11 Plaintiff argues the ALJ failed to consider or discuss whether  
12 she meets the criteria for Listing 12.05 (*Mental Retardation*), which  
13 she asserts is established by post-hearing IQ test results  
14 administered by Drs. Bates-Smith and Toews, and the ALJ's finding  
15 that she has severe impairments of obesity, depression, anxiety and  
16 back pain. (Ct. Rec. 18 at 9-11.) She contends the evidence  
17 establishes that she is "disabled by statutory definition." (*Id.* at  
18 11.)

19 The Commissioner has promulgated a "Listing of Impairments"  
20 that are "so severe that they are irrebuttably presumed disabling,  
21 without any specific finding as to the claimant's ability to perform  
22 his past relevant work or any other jobs." *Lester v. Chater*, 81  
23 F.3d 821, 828 (9<sup>th</sup> Cir. 1995). If a claimant's impairment does not  
24 meet the criteria specified in the Listings, he or she is still  
25 disabled if the impairment equals a Listing. 20 C.F.R. §§  
26 404.1520(d), 416.920(d). If a claimant has more than one  
27 impairment, the Commissioner must determine whether the combination

1 of impairments is medically equal to any listed impairment. 20  
2 C.F.R. §§ 404.1526(a), 416.926(a). A claimant's symptoms "must be  
3 considered in combination and must not be fragmentized in evaluating  
4 their effects." *Lester*, 81 F.3d at 829.

5 Plaintiff has the burden of demonstrating disability under the  
6 Listings by producing evidence that her impairment meets all the  
7 specified medical criteria. *Sullivan v. Zebley*, 493 U.S. 521, 530-  
8 31 (1990); *Roberts v. Shalala*, 66 F.3d 179, 182 (9<sup>th</sup> Cir. 1995). An  
9 ALJ is not required, as a matter of law, to state why a claimant  
10 failed to satisfy every different Listing. *Gonzalez v. Sullivan*,  
11 914 F.2d at 1201.

12 Here, Plaintiff must produce evidence that her mental  
13 impairment meets both the description in the introductory paragraph,  
14 as well as the criteria in paragraph C. The Introduction to the  
15 category of Mental Disorders Listings (12.00) explains in detail the  
16 Listing requirements:

17 We will find that you have a listed impairment if the  
18 diagnostic description in the introductory paragraph and  
19 the criteria of both paragraph A and B (or A and C, when  
20 appropriate) of the listed impairment are satisfied.

21 A criteria of any of the listings in this section [12.00]  
22 cannot be considered in isolation from the description of  
23 the mental disorder contained in the beginning of each  
24 listing category.

25 The structure of the listing for mental retardation  
26 (12.05) is different from that of the other mental  
27 disorders listings. Listing 12.05 contains an  
28 introductory paragraph with the diagnostic description for  
29 mental retardation. It also contains four sets of  
30 criteria (paragraphs A through D). If your impairment  
31 satisfies the diagnostic description in the introductory  
32 paragraph AND any one of the four sets of criteria, we  
33 will find that your impairment meets the listing.

20 C.F.R. Pt 404, Subpt. P, App. 1, Section 12.00 A. (*Emphasis*

1 added.)

2 The diagnostic description in the introductory paragraph of  
3 Listing 12.05 states:

4 Mental retardation refers to significantly subaverage  
5 general intellectual functioning with deficits in adaptive  
6 functioning initially manifested during the developmental  
period; i.e., the evidence demonstrates or supports onset  
of the impairment before age 22.

7 Criteria C. requires:

8 A valid verbal, performance, or full scale IQ of 60  
9 through 70 with a physical or other mental impairment  
10 imposing an additional and significant work-related  
limitation of function.<sup>2</sup>

11 *Id.* Section 12.05 C.

12 Plaintiff has not provided conclusive evidence of an onset of  
13 subaverage general intellectual functioning with deficits in  
14 adaptive functioning before the age of 22. *See Randall v. Astrue*,  
15 570 F.3d 651, 658-59 (5<sup>th</sup> Cir. 2009)(claimant's impairment under  
16 Listing 12.05 must satisfy the diagnostic description independently  
17 of the severity criteria); *Wall v. Astrue*, 561 F.3d 1048, 1062 (10<sup>th</sup>  
18 Cir. 2009) (evidence must demonstrate onset of subaverage  
19 intellectual functioning before the age of 22); *Novy v. Astrue*, 497  
20 F.3d 708, 709 (7<sup>th</sup> Cir. 2007)(deficits in adaptive functioning  
21 "denotes inability to cope with the challenges of ordinary everyday  
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23 <sup>2</sup> By definition, severe impairments identified at step two are  
24 those impairments that cause a significant limitation on a  
25 claimant's ability to do basic work activities. 20 C.F.R. §§  
26 404.1520(c), 416.920(c); 20 C.F.R. Pt 404, Subpt. P, App. 1, Section  
27 12.00 (*Mental Disorders*).

1 life" )(citing THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT  
2 REVISION (DSMIV-TR) 42 (4<sup>th</sup> ed.2000)).

3 A finding that an impairment meets or equals a Listing cannot  
4 be based on self-report. 20 C.F.R. § 404.1529(d)(3), 416.929(d)(3).  
5 Plaintiff's contradictory self-report regarding special education is  
6 insufficient to establish the requirements of the introductory  
7 paragraph. Further, "longstanding policy requires that the judgment  
8 of a physician or psychologist designated by the Commissioner on the  
9 issue of [Listing] equivalence on the evidence before the  
10 administrative law judge . . . must be received into the record as  
11 expert opinion evidence and given appropriate weight." SSR 96-6p.  
12 **The Commissioner advises when the evidence suggests a judgment of**  
13 **equivalence may be reasonable, the ALJ must call a medical expert**  
14 **to obtain an updated medical opinion regarding medical equivalence.**  
15 ***Id.***

16 It is not clear from the record whether Plaintiff argued she  
17 met or equaled Listing 12.05 in her request for review by the  
18 Appeals Council. The Order of the Appeals Council references a  
19 brief submitted by Plaintiff's representative in April 2009, but it  
20 does not appear to be part of the record. (Tr. 4.) Therefore, the  
21 court cannot determine whether Plaintiff argued her theory regarding  
22 Listing 12.05 at the administrative level. See *Lewis v. Apfel*, 236  
23 F.3d 503, 514 (9<sup>th</sup> Cir. 2001). Further, since the Borderline  
24 Intellectual Functioning diagnosis was identified in evidence  
25 submitted after the hearing, Plaintiff's representative did not have  
26 an opportunity to address the possibility that Plaintiff met or  
27 equaled Listing 12.05 during his opening or closing statements at  
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1 the hearing. Because the record and findings by the Commissioner do  
2 not indicate adequate consideration of Plaintiff's mental  
3 impairments vis à vis Listing 12.05, remand for additional evidence,  
4 testimony, and findings is appropriate.

5 On remand, Plaintiff may submit additional evidence to  
6 establish the requirements of the introductory paragraph for  
7 consideration by the ALJ and, if necessary, by a medical expert who  
8 will testify as to whether a Listing is met or equaled. It is  
9 possible Plaintiff may not succeed in proving she meets a Listing or  
10 is disabled by her impairments; however, because the ALJ's decision  
11 is tainted by legal error, remand is necessary.

#### 12 CONCLUSION

13 The ALJ's decision is based on legal error. Remand is  
14 necessary for specific, "clear and convincing" credibility findings,  
15 assessment of lay testimony as directed by SSR 06-03p, re-evaluation  
16 of the medical evidence in its entirety, and medical expert  
17 testimony. Full consideration of the evidence, including the post-  
18 hearing psychological evaluations, may require a new hearing with  
19 additional testimony from a vocational expert at steps four and five  
20 finding. Accordingly,

#### 21 IT IS ORDERED:

22 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
23 **GRANTED**;

24 2. The case is **REVERSED AND REMANDED** to the Commissioner for  
25 additional proceedings pursuant to sentence four of 42 U.S.C.  
26 § 405(g) and consistent with this Order;

27 3. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is  
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1 **DENIED.**

2 4. Application for attorney fees may be made by separate  
3 motion.

4 The District Court Executive is directed to file this Order and  
5 provide a copy to counsel for Plaintiff and Defendant. Judgment  
6 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

7 DATED January 21, 2011.

8  
9 S/ CYNTHIA IMBROGNO  
10 UNITED STATES MAGISTRATE JUDGE  
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